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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D.C. 20548

[Post-Award Protests of Department of Commerce Contract]

FILE: B-200823; B-200823.2 DATE: February 12, 1981

MATTER OF: Minority Media Syndicate Inc.;
North American Precis Syndicate,
Inc.

DIGEST:

1. When agency has agreed to reopen negotiations with amended solicitation reflecting changed needs and evaluation factors, protest based on award of contract on terms other than those stated in solicitation is dismissed as moot.
2. Opportunity to revise or modify proposal constitutes discussions, which must be held with all offerors, including those who have submitted alternate proposals.
3. GAO does not review affirmative determinations of responsibility unless there is showing of fraud or when definitive responsibility criteria allegedly have not been applied.
4. Protest of specification is untimely when filed after closing date for receipt of initial proposals.
5. In negotiated procurement, "bids" need not be publicly opened nor prices disclosed to competitors.

This case involves two post-award protests to which the contracting agency, the Department of Commerce, responded by acknowledging that it negotiated and awarded a contract on terms other than those stated in the solicitation. The agency therefore issued an amended solicitation and reopened negotiations for another round of best and final offers.

Since this action follows the recommendation of our Office in a similar case, we are dismissing the protests on this ground as moot. The details follow.

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Minority Media Syndicate Inc. and North American Precis Syndicate, Inc. both protested the award of a contract for a series of weekly newspaper columns aimed at informing and educating the public about metric terms and measures.

According to the solicitation (No. SA-RSD-80-0011, issued April 16, 1980), the U.S. Metric Board was concerned that small newspapers were not being included in its public information programs, which are required by the Metric Conversion Act of 1975, 15 U.S.C. § 205e (1976). The Board therefore sought a contractor to produce a total of 36 feature articles, with mastheads, headlines, and illustrations in "camera ready" format. Twenty-four of the columns were to describe a specific aspect of metric usage, such as gasoline pump conversion or tools, in 500-700 words; the remaining 12 were to be of a more general nature, discussing, for example, the impact of the metric system on business, in 150-200 words. Columns were to be distributed weekly to no less than 3,000 suburban newspapers with circulations not greater than 25,000 readers. The contractor also was to be responsible for establishing and maintaining a selective mailing list and for monitoring and providing clippings of articles used.

The solicitation stated that proposals would be evaluated--in order of importance--on the basis of relevant experience, personnel, facilities/equipment, available data, and cost/price, with award to the offeror who submitted a technically acceptable proposal which provided the most advantageous quality/cost relationship.

After reviewing the proposals of four offerors, including the protesters, the Metric Board determined that all had demonstrated technical capacity to fulfill its requirements. National Educators offered the lowest price; North American and Minority Media also were competitive for 36 columns. However, all offers exceeded the \$40,000 available for the project. (The fourth offeror's price was about \$200,000 more than the others, and apparently it was not considered to be in the competitive range.)

In order to stay within its budget, the Metric Board agreed to reduce the number of columns to be contracted for from 36 to 31. Both protesters had submitted alternate proposals for fewer columns at increased unit prices, North American's an additional \$85 per column and Minority Media's an additional \$95.50 per column. Both firms also stated that 10 percent should be added

to their prices for releases after October 1, 1980, and North American added an additional amount for releases which were more than seven inches deep when set in type.

Using these alternate proposals, the contracting officer calculated prices for 31 columns for each of the protesters. He contacted National Educators for the sole purpose of determining what it would offer as a 31-column price. National Educators increased its unit prices for the 500-700 word columns by \$4 per column but did not otherwise change its proposal. A \$39,040 contract for 19 long and 12 short columns was awarded to National Educators on September 26, 1980; the firm has produced five columns to date.

The primary argument made by the two protesters is that the award was made on terms other than those outlined in the solicitation, *i.e.*, to a firm which lacks experience, the most important evaluation factor, and for a different number of columns than specified.

After the protests were filed, the Department of Commerce, citing our decision in Lawrence Johnson and Associates, B-196442, March 1, 1980, 80-1 CPD 188, issued an amended solicitation reflecting the Metric Board's changed needs and budget. It asked all offerors in the competitive range to submit revised offers for production and distribution of 26 columns (14 long and 12 short) and for circulation of the five columns already produced by National Educators. In addition, the amended solicitation listed cost/price as the second-most important evaluation factor. Revised offers were submitted January 7, 1981, and North American has substantially reduced its price. The agency argues that its actions rendered the protests moot.

We agree. An opportunity to revise or modify a proposal, which National Educators was given, consists of discussions, which must be held with all offerors. Even though the protesters had submitted alternate proposals, when budget limitations forced the Metric Board to reduce the number of columns to be contracted for, these firms should have been given an opportunity to review their offers and perhaps modify their prices. *Cf.* 51 Comp. Gen. 479 (1972) (which does not involve alternate proposals).

Since the Department of Commerce has now provided such an opportunity, and has revised the order of importance of evaluation factors in the amended solicitation, no useful purpose would be served by our reviewing the protests on

these grounds. See S.E.S. Company, Inc., B-197508, February 14, 1980, 80-1 CPD 136. Further, in view of the reopening of negotiations, North American's protest regarding miscomputation of its original price is also moot.

The remaining bases of protest include the responsibility of the current contractor, the failure to use minority media, and the failure to disclose "bid" prices.

Both protesters allege that the current contractor lacks necessary experience, personnel, facilities, and financial resources. We will not consider protests on these grounds. Because of the great discretion given contracting officers, our Office reviews affirmative determinations of responsibility only when there is a showing of fraud or when definitive responsibility allegedly have not been applied. Arkansas Valley Dredging Company, B-199398, July 23, 1980, 80-2 CPD 65. Neither exception is present here.

Arguments regarding use of minority media are untimely, since media targets were identified in the solicitation by size, not race or national origin; any protest on this ground should have been filed before the closing date for receipt of initial proposals. 4 C.F.R. § 20.2 (1980). The reopening of negotiations does not convert this untimely protest into a timely protest.

Finally, this was a negotiated procurement, and unlike an advertised procurement, does not require sealed bids to be opened publicly or prices to be disclosed to all competitors. This ground of protest is without merit.

The protests are dismissed in part and denied in part.


For the Comptroller General
of the United States